IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr.Appeal No. 29 of 2007.

Judgement reserved on: 3.12.2007

Date of decision: 13.12.2007 .

Onkar Singh **…….Appellant**

Vs.

State of H.P. **…. Respondent.**

Coram

The Hon'ble Mr. Justice Kuldip Singh, Judge.

Whether approved for reporting?[1] Yes

For the Appellant : Mr. Rakesh Jaswal , Advocate.

For the Respondent : Mr. P.M. Negi, Dy. Advocate General.

Kuldip Singh, Judge.

This appeal has been directed against the judgment of conviction and sentence dated 24.3.2006 passed by learned Presiding Officer, Fast Track Court, Mandi in Sessions Trial No.2/2003/28/2005 whereby appellant has been convicted under Sections 307, 326, 325 and 323 IPC. He has been sentenced to undergo rigorous imprisonment for various terms, in addition to fine, under Sections 307 and 325 IPC and for the reasons stated in the impugned judgment no separate sentence has been awarded to the accused under Sections 323, 326 IPC. Both the sentences have been ordered to run concurrently.

Whether the reporters of the local papers may be allowed to see the Judgment? Yes

2. The prosecution case in brief is that on 21.1.2002 PW-4 Puran Chand along with his wife PW-5 Smt. Leela Devi and sister Kala Devi at about 1.30 P.M. was cutting bushes on the path situated near his house. The accused came there and pelted stones on PW-4, one of the stone struck Puran Chand on his back. The accused thereafter inflicted an axe blow upon the head of PW-4 and his head started bleeding which stained his clothes. He gave beatings to PW-5 causing injuries to her. She raised cries, on hearing her cries PW-9 Vijay Kumar and Vidya Devi came there but the accused ran away. PW-4 and PW-5 were examined by PW-1 Dr. Nag Raj Pawar, he issued MLC Ex.PW-1/B of PW-4 Puran Chand and MLC Ex,.PW-1/C of PW-5 Leela Devi. PW-1 informed the police and such information was recorded in daily diary, a copy Ex.PW-11/A. On receipt of information PW-12 ASI Nand Lal went to the hospital, Jogindernagar and recorded the statement of PW-4 Puran Chand under Section 154 Cr.P.C, Ex.PW-4/A and there upon FIR Ex.PW-13/A was registered.

3. The Investigating Officer conducted the investigation, prepared site plan Ex.PW-13/C, broken bangle pieces lying on the spot were taken into possession vide memo Ex.PW-6/B. The axe Ex.P-1 was also taken into possession vide memo Ex.PW-8/A. After completion of the investigation challan was put up. The accused was charged under Sections 323, 325, 326, 307 and 506 IPC. After conclusion of trial, accused was convicted and sentenced as stated above, hence this appeal.

4. I have heard Mr. Rakesh Jaswal, learned counsel for the appellant and Mr. P.M. Negi, Dy. Advocate General for the State. The learned counsel for the appellant has submitted that the prosecution has miserably failed to prove the case against the appellant. The Court below has not properly appreciated the material on record. The prosecution case is full of contradictions. The prosecution story is highly improbable. The accused has been falsely implicated. The learned Dy. Advocate General has supported the impugned judgment and has submitted that the prosecution has proved the case beyond reasonable doubt.

5. The prosecution main witnesses are PW-1, PW-4, PW-5. PW-9 Vijay Kumar as per prosecution reached the spot later on after hearing the cries of PW-5 Leela Devi. PW-4 Puran Chand has stated that he, his sister Kala Devi and wife PW-5 Leela Devi went to cut bushes on the path situated near their house. He was cutting bushes and the accused started pelting stones on him. One such stone struck him on his back. Thereafter accused inflicted an axe blow upon his head due to which his head started bleeding and his clothes were also stained in blood. The accused also inflicted an axe blow upon his arm. The accused gave beatings to his wife PW-5 Smt. Leela Devi, she raised alarm and on hearing her cries his son Vijay and Vidya Devi came on the spot and accused ran away. In cross-examination he has stated that they were cutting bushes with sickle. He suffered injuries on his back. He denied that his wife inflicted an axe blow upon the accused and such blow which was given by his

wife struck him as a result of which, he sustained injuries. He denied that his wife sustained injuries as she fell down.

6. PW-5 Smt. Leela Devi has stated that when they were cutting bushes then accused pelted stones on them and one of the stone struck her husband on his back. The accused thereafter inflicted an axe blow upon the head of her husband causing injuries to him, the blood came out of the injuries. The accused gave beatings to her also. Vidya Devi and her (PW-5) children came there. The police took into possession the broken pieces of her bangles from the spot. PW4 and PW-5 identified the axe Ex.P-1. PW-1 Nag RaJ Pawar medically examined PW-4 Puran and issued MLC Ex.PW-1/B and found following injuries on the person of PW-4 Puran Chand:-

> **"Injury No.1:** ***Spindle shape incised wound present on the scalp over lying right frontal area of scalp. Size is 4.5 x 1 Cm. from the Centre x whole thickness of the scalp deep, the wound is deep from the centre and shallow from both hands (sic), margins of the wound are clean and edges everted, bleeding fresh, the direction of wound is anterio-posterior. There is cut in the external cranial-vault seen on exploration which is present in the central area of the wound. Size of this is 2 Cm. long.***
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> **Injury NO.2:** ***Abrasion of bright red colour placed, transversely over the posterior aspect of chest left side, overlaying the area of 10th/11th sizes 5 x 0.5 Cm. tailing medially."***

On C.T. Scan, fracture of right frontal bone and sub-dural haemotoma under lying this reason was detected. According to PW-1

injury NO.1 on the person of PW-4 was grievous and dangerous to life and injury No.2 was simple in nature. He has opined that injury No.1 was caused with sharp edged weapon and injury No.2 with blunt weapon. Injury No.1 is possible with axe Ex.P-1 and injury No.2 with blunt weapon. PW-1 also examined PW-5 Smt. Leela Devi and issued MLC Ex.PW1/C and found following injuries on her person:-

> ***"1. Irregular contusion of pinkish red in colour placed over upper medial aspect of glutell region on the right side size is 5 x 3 C.M. which is tender to touch.***
>
> ***2. Contusion over medial aspect of right leg. Pinkish red in colour. Size is 3 x 2 Cm. and about 6 Cm. below the knee joint. Swelling is present over the area which is tender to touch and movement on the joint are painful.***
>
> ***3. Lacerated wound overlaying the area of 5th metatarsal bone in the left foot on the dorsal aspect size, is 2 x 0.5 x 2.05 Cm. tender to touch bright red colour clots seen around the bone".***

According to PW-1 injuries No.1 and 3 were simple and injury No.2 was grievous. The injuries No.1 and 2 are possible with blunt side of axe Ex.P-1 and with handle of axe Ex.P-1 and injury No.2 is possible with blunt weapon.

7. According to PW-4, accused initially pelted stones on him and one stone hit him on the back and he suffered injuries on his back. He has also stated that accused inflicted an axe blow upon his arm. PW-1 has not noticed any injury on the back of PW-4 and axe blow injury on his any arm in MLC Ex.PW-1/B nor PW-1 in his

statement has stated that PW-4 sustained stone hit injury on his back and axe blow injury on his arm. Thus the prosecution story to this extent has not been supported by medical evidence. As per prosecution evidence PW-4 Puran Chand was having his back towards accused and for that reason PW-4 has stated that one of the stone pelted by accused hit him on the back. PW-1 while describing injury No.1 on the person of PW-4 has stated that the direction of the wound was anterio-posterior. In other words according to PW-1 the axe blow was given on the head of PW-4 from front side but how the blow was given by accused to PW-4 from front side when accused was on the back side of the PW-4, this has not been explained by PW-4 and PW-5. There is yet another aspect of the case which makes prosecution story suspicious. PW-1 while describing injury No.2 on the person of PW-4 has stated that this injury was placed transversely over the posterior aspect of chest left side, overlaying the area of $10^{th}/11^{th}$ sizes 5 x 0.5 Cm. tailing medially and injury No.2 is possible with blunt weapon. He has stated that such weapon could be blunt side of axe Ex.P-1 or its handle. He has not stated that the blunt weapon could be stone, nor any stone has been recovered by the prosecution. PW-4 has not stated that accused gave any blow on his person from the blunt side of Axe Ex.P-1 or its handle. The PW-4 has stated that accused gave Axe blow on his head and as well as on his arm and no other part of the body. The medical evidence regarding injuries No.1,2 on the person of PW-4 is not in consonance with ocular evidence. PW-5 in her statement has stated that accused gave her beatings and caused injuries but she has not stated how

and in what manner accused gave her beatings and caused injuries. She has not stated that blunt side of the axe was used by the accused for giving beatings to her nor she has stated that accused gave her beatings with fist and kick blows or used any other weapon of offence. Therefore, opinion of PW-1 doctor that injuries No.1 and 3 found on the person of PW-5 could be caused by blunt side of Ex.P-1 and with the handle of Ex.P-1 and injury No.2 on her person could be caused by blunt weapon is not of much significance. PW-4 has not stated that when accused gave beatings to PW-5 her bangles were also broken. Even PW-5 has not stated that the bangles were broken in the beatings given by the accused though she has stated that the police has taken into possession broken pieces of the bangles from the spot. Simply police took into possession broken pieces of her bangles from the spot does not mean that those pieces of bangles are the result of beatings given by accused to her.

8. It is the prosecution case that Smt. Kala Devi sister of PW-4 injured was also present on the spot when accused gave beatings to PW-4 and PW-5. The prosecution has not examined Kala Devi. She was given up on the ground that she was won over by the accused. It has been held in ***The State of U.P. and another vs. Jaggo alias Jagdish and others AIR 1971 Supreme Court 1586*** that mere presentation of an application that witness has been won over is not conclusive of the question that the witness has been won over. The bald statement of the prosecution that Smt. Kala Devi was won over by the accused is not believable. Smt. Kala Devi is the

sister of PW-4. According to prosecution she was eye witness and therefore, she was most material witness. The learned counsel for the appellant has rightly submitted that adverse inference is to be drawn against prosecution for not examining Kala Devi. The prosecution has also not also examined Vidya Devi who reached the spot as per prosecution after hearing cries of PW-5 Smt. Leela Devi. The evidence led in the case is not in conformity with the prosecution story. The prosecution has not examined any independent witness in support of the case. The defence plea cannot be ruled out altogether that PW 4 was injured when PW 5 gave axe blow to accused and that blow instead of hitting the accused, hit PW 4 and injury to PW 5 was caused due to fall and not as alleged by the prosecution. The prosecution has failed to prove case against the accused beyond reasonable doubt. The learned Court below has not properly appreciated the evidence on record and has erred in convicting and sentencing the accused. The impugned judgment is thus liable to be set aside.

9. The result of the above discussion, the appeal is allowed, judgment of conviction and sentence dated 24.3.2006 passed by learned Presiding Officer in Sessions Trial No.2/2003/28/2005 is set aside. The appellant is acquitted of the charge, fine amount, if any deposited by accused be refunded to him and he be released forthwith, if not required in any other case.

(Kuldip Singh)
Judge.

December 13, 2007
(sks)